



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Atorie Air  
**File:** B-235847  
**Date:** October 12, 1989

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### DIGEST

1. Agency's rejection of protester's proposal as unacceptable was proper where the solicitation informed offerors that delivery was a critical element of the solicitation and the protester's final submission substantially qualified its intent to meet that requirement.
2. Contention that agency allowed awardee to change the place of final inspection and acceptance specified in the solicitation is not supported where the awardee confirmed its compliance with the requirement and the record shows that the requirement was not changed.

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### DECISION

Atorie Air protests the rejection of its proposal and the award of a contract to Basler Flight Service, Inc., under request for proposals (RFP) No. F09603-89-R-23892, issued by the Air Force for a DC-3/C-47 aircraft.

We deny the protest.

The procurement was conducted under the foreign military sales program on behalf of Madagascar. The RFP was issued on December 20, 1988. On February 21, 1989 the Air Force issued amendment 0002 which, among other things, added an option for color radar which could be exercised by the agency any time prior to 30 days before delivery of the aircraft. Delivery was required within 45 days of award.

Atorie and Basler were the only firms submitting proposal. The agency subsequently issued a third amendment concerning Federal Aviation Administration (FAA) certification of aircraft. When it acknowledged that amendment, Atorie wrote on the acknowledged amendment that it would like 60-day delivery requirement instead of 45. The agency

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responded that it could not grant extra time. Best and final offers (BAFOs) were due May 19. By letter of May 17, Atorie confirmed its existing proposal but also stated "If radar option is requested, we plead for at least 15 extra days." Before BAFOs were evaluated, the Air Force determined that the color radar was now a firm requirement and not an option. Because of this, on May 18 the agency extended the date for receipt of BAFOs to May 23. In its message extending the BAFO due date, the agency also stated that delivery of the aircraft was of "utmost importance." That same day, the agency verbally informed Atorie that delivery would have to remain at 45 days. Atorie acknowledged the change but stated in its letter that the manufacturer of the radar had informed it that there would be a 4-week delay in shipping, and that "we feel there will be a slight delay in departure U.S. that is beyond our control." Additionally, the protester stated that it needed to know that the agency realized that "there is the possibility of delay of delivery of aircraft due to mechanical interruptions, customs and unforeseen delays that are beyond our control, i.e. weather and/or wars, and will make the necessary adjustments in delivery time." Atorie also stated that it expected a written response to this matter if it were awarded the contract.

The agency determined that based on this letter, Atorie would not meet the required delivery date and that consequently, its proposal was unacceptable. The agency made award to Basler on May 25 and the contract has been completed.

Atorie contends that the radar requested could not be obtained from the manufacturer for at least 4 weeks and that the request for modification of delivery times was only to cover circumstances beyond the company's control.

The agency maintains that through its numerous communications, Atorie made it clear that it could not supply the radar in time to meet the RFP delivery schedule. Since both offerors were informed that time of delivery was crucial, the agency believes it was justified in rejecting the protester's proposal since the requirement could not be met with the 4 weeks shipping delay for the radar mentioned by Atorie.

An offeror has an obligation to submit a proposal which fully complies with the terms and conditions of the solicitation and runs the risk of having its proposal rejected if it fails to do so. ES Computer Sales, Inc., B-233608, Dec. 2, 1988, 88-2 CPD ¶ 556. A proposal which does not conform to the material terms and conditions of

solicitation may not form the basis for award. Ralph Korte Constr. Co., Inc., B-225734, June 17, 1987, 87-1 CPD ¶ 603.

Here, the RFP specifically notified offerors that the delivery schedule was a "critical element" of the solicitation. Also the protester does not dispute that it was informed by the agency that the delivery date was of "utmost importance" and could not be extended. Although the protester argues that in its final submission it only expressed its concerns about delivery, and did not state that it would not meet the RFP delivery requirement, we think the agency's interpretation of the protester's BAFO letter as an expression of Atorie's inability to deliver the aircraft on time was reasonable. In our view, Atorie's statement that the manufacturer had advised it of a 4-week delay in shipping followed by its statement that there would be a slight delay in departure that was beyond its control plainly expresses the company's inability to meet the RFP's delivery date. This interpretation is also consistent with Atorie's prior repeated expressions of concern regarding the delivery schedule. Since we find the Air Force's interpretation reasonable, there is no reason for us to object to the agency's rejection of Atorie's proposal as unacceptable.

To the extent Atorie is contending that the delivery requirement was improper, that argument is untimely and will not be considered. Our Bid Protest Regulations require that a protest alleging an impropriety in a solicitation which did not exist in the initial solicitation but which was subsequently incorporated must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1989). Atorie's protest was not filed until after the award was made.

Atorie also contends that although the RFP specified that final acceptance of the aircraft was to occur in Madagascar, in the contract awarded to Basler, final acceptance was changed to the United States. Atorie states that this is evidence of the "unusual consideration" the agency gave to Basler.

The record shows that in its acknowledgment of the second amendment, Basler indicated, contrary to the RFP, that final acceptance was to occur in the United States. The record also shows, however, that by letter of March 23, Basler specifically agreed that final inspection and acceptance would occur in Madagascar. According to the agency, upon receipt of the acknowledgment, it informed Basler that the final inspection and acceptance had to occur in Madagascar, and Basler by its March 23 letter, agreed to those terms.

Since there is no evidence in the record to support Atorie's contention that the requirement was changed, we deny this ground of protest.

Atorie also contends that one of the engines on Basler's aircraft is not FAA certified as required by the RFP because it was overhauled by Far East Air Transport which is not an FAA certified repair facility.

The record does not show that Basler took any exception in its proposal to this requirement. In any event, the agency has informed us that FAA certification of the engine was verified prior to its acceptance of the aircraft. According to the agency, although the engine came from Far East, it was overhauled by Air Asia Company Ltd., an FAA certified facility.

Finally, Atorie suggests that there was an indication of impropriety in the procurement since the telegram it received notifying it that the color radar was a firm requirement had Basler's address on it. The agency stated in its report that this was a typographical error. Since the protester has not responded to the agency report on this issue, we consider it abandoned. See Action Indus. Supply, B-224819, Jan. 6, 1987, 87-1 CPD ¶ 11. In any event, we do not understand how this indicates any impropriety.

The protest is denied.

*for* *James F. Hinchman*  
James F. Hinchman  
General Counsel